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No. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

BROWN & GETTLER
J. W. Brown
Ben Gettler
Jonas B. Katz
1505 Fountain Square Bldg.
Cincinnati, Ohio
Attorneys for Petitioners

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PRELIMINARY STATEMENT

The Board predicates the arguments in its brief on the following assumptions:

1. The instant cause primarily involves the question of the Board's discretionary authority. (Pp. 6, 10-23, Brief)

2. The decision in *Office Employees* is *sui generis*. (Pp. 36-39, Brief)

3. The Board has determined that the hotel business is essentially local in character. (Pp. 8, 28-36, Brief)

4. The primary purpose of certification proceedings under Section 9 (c) of the Act is to lay the foundation for subsequent unfair labor practice proceedings under Section 10 of the Act. (Pp. 7, 23-28, Brief)

The succeeding argument will demonstrate the error of these assumptions.

ARGUMENT

I.

THE DISTRICT COURT HAD JURISDICTION TO REVIEW THE ACTION OF THE BOARD HEREIN.

The Board's contention that section 9 (d) of the Act precludes judicial review in the instant case cannot be sustained for the reason that said section provides only for a review of errors arising in affirmative acts of certification by the Board.[1] It does not eliminate judicial review challenging acts of the Board which preclude all agency action. The instant case is therefore analagous to *Leedom, et al* v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145 (1956) and not *Leedom* v. *Kyne*, 249 F. 2d 490 (CA-DC, 1957), No. 14, this Term.[2]

The Board concedes that the District Court has jurisdiction to review acts of the Board "plainly beyond the scope of its statutory authority" or in violation of the Constitution (Brief, p. 14). Its argument that the instant

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[1] The position that there is no jurisdiction to review contravenes the Board's position in *Breeding Transfer, Inc.*, 110 NLRB 493.

[2] *Fay* v. *Douds*, 172 F. 2d 720 (CA-2, 1949); *Farmer* v. *The United Electrical Workers*, 211 F. 2d 36 (CA-DC, 1953) cert. denied, 347 U.S. 943.

cause involves only a question of discretion and, therefore, that the District Court had no jurisdiction presumes the answers to the very statutory and constitutional issues which are presented to this Court for determination.

II.

THE DECISION OF THIS COURT IN OFFICE EMPLOYEES IS CONTROLLING.

The Board's argument that the holding in *Office Employees* v. *National Labor Relations Board*, 353 U.S. 313 (1957), is not applicable ignores one of the two holdings of the majority of this Court in that case. It is submitted that the majority held as follows in *Office Employees*:

1. Labor organizations are employers under Section 2 (2) of the Act with respect to their own employees.
2. The Board is without power to decline jurisdiction over an entire category of interstate employers.

The minority, on the other hand:

1. concurred in the holding that labor organizations are employers under section 2 (2) of the Act with respect to their own employees.
2. dissented from the holding that the Board does not have power to decline jurisdiction over an entire category of interstate employers. The minority held, however, that such declination must be for proper reasons.
3. held that the Board did not have proper reasons for excluding from the Act the entire category of labor organizations when acting as employers.

The Board argues that *Office Employees* is *sui generis*. It states: (Brief, p. 37)

> "In essence, the opinion holds that the Board's classification of labor unions was based on a ground that Congress had expressly considered and rejected—to-wit, that a labor union, because of its fraternal organization and its purposes of mutual betterment, should not be treated like other employers."

It is submitted that the above statement perverts the very point on which this Court split in *Office Employees,* and sets forth the view of the minority as if it were the holding of the majority of this Court.

The Board goes on to argue that this Court did not intend *Office Employees* to prohibit the Board from excluding entire classes of interstate employers because such a holding would prohibit the Board from setting up dollar volume jurisdictional standards. It is submitted that this Court did not equate the exclusion of an entire class of interstate employers with the exclusion of small employers whose business volume does not sufficiently affect commerce.[3] Such an exercise of discretion, however, is vastly different from the assumption of the power to decline jurisdiction over all employers in a particular industry, without regard to the size or the impact on interstate commerce of any of the employers in that industry. The exercise of such power is an exercise of the Congressional power of repeal. *Office Employees,* 353 U.S. 313, 315.

Even the minority opinion in *Office Employees,* however, requires a reversal in the instant cause, since the reason given by the Board for declining jurisdiction was not a proper reason. As set forth at pages 13 to 16 of the Brief of Petitioner, the reason that the Board excluded the hotel industry "has rested on a conclusion that Congress intended to exempt the industry". 5 CCH, Labor Law Reporter, par. 50,099; 42 LRR 448, 9.

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[3] The Board's theory of refusing to assert jurisdiction in cases where an employer does less than a particular total amount of business is simply an application of the maxim *"de minimis non curat lex." NLRB* v. *Fainblatt,* 306 U.S. 601, 607 (1939); *Joliet Contractors* v. *NLRB,* 193 F. (2d) 833 (CA-7, 1952).

The Solicitor General ignores these facts and instead states that the Board has concluded that "the hotel business is essentially local in character and does not have a sufficient impact on commerce as to justify this diversion of the Board's limited resources from more pressing matters". (Brief, p. 8) We must respectfully point out to the Court that there is nothing in the record to justify the foregoing quoted statement.[4] No such finding was made by the Board.

This Court should not speculate as to whether there might have been some other reasons for the declination of the Board to act. Speculation of that kind would have required the minority in *Office Employees*, after determining that the Board's reasons were not proper, to ascertain whether there might not have been some other reason for which the Board could properly have declined jurisdiction if it had considered such other reason.

Such a holding would result in this Court's being required to determine in the first instance questions the Board has never considered and on which the Board has never heard evidence. In the instance case, it would require the Court to determine the impact of the entire hotel industry on inter-state commerce. None of the commerce facts set forth in the Board's brief is in the record, and none was introduced in any hearing.[5] In fact the authority cited

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[4] Counsel for Amicus Curae recognize that the Board's declination of jurisdiction in the hotel industry is based on its interpretation of Congressional intent. They state at page 5 of Brief of American Hotel Association as follows:

"The Board did not base such refusal on the grounds that the hotels were analogous to any other class of employers, but on the well founded belief that Congress believed that labor disputes in hotels generally did not have a substantial effect on commerce."

[5] The Board refused to hold a hearing at which commerce facts could have been developed. The contention of the Solicitor General that a hearing was held is directly contrary to the record unless an oral argumnt with no evidence permitted, no opportunity to examine witnesses and for the sole purpose of determining whether the board should conduct a representation hearing in the instant case is a "hearing". Chairman Farmer recognized the need for a hearing, stating in his dissent "that the Board should give consideration after a hearing to modifying its policy so as to take jurisdiction on a limited basis pursuant to appropriate standards". (Record, Pp. 18, 19.)

for the data was not even published until 1957—2 years after the Board's decision. Yet they are being argued to this Court.[6]

Similarly, the Solicitor General "suggests" the "relative absence of labor disputes in the hotel industry" as a possible basis for the Board's policy. (Brief, p. 33) Again there is no evidence in the record concerning the existence or non-existence of labor disputes other than that of the Miami Beach employers herein.[7]

The Board based its decision solely on the premise that Congress intended to exempt the hotel industry. Counsel for the Board cite only two authorities to substantiate this conclusion of the Board.

The first authority is a statement of Mr. Charles Sands introduced into the hearings before the Senate committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. P. T. 4, pp. 2343-2344 (March 13, 1947). Mr. Sands' first sentence after introducing him-

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[6] The following facts may also be derived from the same source cited by the Solicitor General, that is, the Bureau of Census:

There are 11,000 hotels in the United States having over twenty-five rooms. Approximately 1500 of these have receipts of over $300,000 per year. Hotels whose receipts are in excess of $500,000 annually account for more than one-half of the entire industry receipts of approximately two and one-half billion dollars. These hotels employ 270,000 of the 377,000 persons employed in the industry and paid $473,000,000 of the hotel industry's payroll of $802,000,000. Bureau of Census, U. S. Census of Business, 1954, Vol. V, Selective Service Trades, Summary Statistics, Table 2A, C-2, p. 30.

The annual dollar volume of the hotel industry is more than twice that of the total receipts of the soft drink, beer and liquor manufacturing industries combined. It is more than twice that of the men's and boys' suit and coat industry. It is one and one-half times that of the cigarette industry. Since the hotel industry is primarily a service industry, the size of the payroll in the hotel industry shows an even greater disproportion to the size of payrolls in other industries. Thus the annual hotel industry payroll is eight times greater than that of the cigarette industry. This Court should also note that the hotel industry receipts are 340 times greater than those of all skating rinks in the United States, over which the Board has asserted jurisdiction. Bureau of Census, U.S. Census of Mfg., 1954, Vol. 1, Summary Statistics Table 2A, C-2, pp. 4, 6, 20, 27.

[7] Nor was there ever any evidence on this point or reference to it in the Board's opinions in either of the two other hotel cases by the Board declining jurisdiction, i.e., *St. Louis Hotel Association*, 92 NLRB 1338 (1951) and *White Sulphur Springs, Inc.*, 85 NLRB 1487 (1949). In fact, the Board is unable to cite any case in any industry where the factor of the existence or absence of labor disputes was considered by the Board as a basis for declining jurisdiction in the industry.

self was as follows: "Our attorneys are of the opinion that our industry which is, I believe, the third largest, is now covered by the National Labor Relation Act."[8] The only logical conclusion that can be drawn from the foregoing statement is that the Senate Committee was advised in 1947 that the Act, as then written, covered the hotel industry.

The second authority relied upon by the Board is a post-enactment statement of Senator Taft. Such a post-enactment statement, however, cannot be deemed an expression of Congressional intent any more than the contrary opinion of five senators expressed on the floor of the Senate on July 20 and 27, 1955, Cong. Rec. 84th Cong., 1st Sess., Vol. 101, Part. 9, pp. 11008, 11636-39.

It is submitted that neither of the foregoing references provide an argument sufficiently persuasive to overcome the plain words and meaning of the statute and cause the addition of the words "except hotels" to the other exceptions set forth in Section 2 (2) of the Act.

[8] Amicus Curae at page 7 of its brief quotes a portion of Mr. Sands' statement out of context. The third sentence preceding the one quoted and prefacing the quoted statement was as follows: "Under a close reading of the Act, we can reach only the conclusion that it is drafted in as broad language as is possible under the Interstate Commerce clause of the Constitution, and that it does apply to hotels."

III.

SECTION 9 (c) OF THE ACT IS A MANDATORY DIRECTION TO THE BOARD TO ACT IN REPRESENTATION CASES WHEN A QUESTION OF REPRESENTATION AFFECTING COMMERCE EXISTS.

The Board contends that the word "shall" in Section 9 (c) is not mandatory. The premise upon which this assumption is based is "that the primary purpose of certification under Section 9 (c) is to lay the foundation for a subsequent unfair labor practice charge against the employer for a refusal to bargain, a charge which is enforceable only by the Board." The Board, therefore, argues that "it would be anomalous to require certification when the Board declines jurisdiction over the industry in unfair labor practice proceedings." (Brief, p. 24)

It is submitted that the foregoing premise that a certification proceeding is merely a preliminary step, ignores the stated intent of Congress to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers . . . of full freedom of . . . designation of representatives of their own choosing . . ."[9]

We doubt that the Board will deny that the safeguards of an NLRB secret representation election encourages collective bargaining and protects workers' freedom of choice in accordance with those stated policies. Indeed at the time of the 1947 Taft-Hartley amendments Congress recognized that the *major* business of the National Labor Relations Board was the determination of collective bargaining representatives. Senate Report No. 105, 80th Congress, 1st Session, contains the following statement at page 10:

> "In recent years, the number of cases involving disputes with respect to the choice of bargaining repre-

[9] Section 1, Labor Management Relations Act, 1947, 29 USC 151.

> sentatives in the units which they should represent have become the major business of the National Labor Relations Board. Cases of this character for the last 4 years have been more than double the number of complaint cases. In view of the tremendous number of such cases, therefore, it is of utmost importance that the regulations and rules of decision by which they are governed be drawn so as to insure to employees the fullest freedom of choice."

Proof of the wisdom of this observation and the practical operational effect of the Act can easily be found in a comparison of the large number of certifications annually to the insignificant number of refusals to bargain processed by the Board. For example, in the fiscal year ending June 30, 1957, unions were certified as bargaining representatives in 2,942 cases.[10] During that same period, the Board found it necessary to issue only 91 remedial orders directing employers to commence bargaining.[11]

There are additional valuable rights created by a certification alone.[12] For example, a certification is a valid defense in secondary boycott cases arising under Section 8 (b) 4 (B) and (D). Further, a certification by the Board would in all probability have prevented the series of injunction suits arising in the Florida state courts in which the method of establishing majority status was a fundamental question. Nos. 5 and 6 this Term.

The Board is further in error in attempting to establish discretionary authority in 9 (c) cases from the portion of Senate Report No. 105, 80th Congress 1st Sess. which states that the change in section 9 (c) "does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing." (Brief, p. 26). The

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10 *Twenty Second Annual Report*, National Labor Relations Board, Table 13, p. 172.

11 Ibid 11, Table 4, p. 164.

12 The Board recognizes the advantages of certification at p. 13 of its brief.

phrase "rules of decision with respect to substantiality" refers only to the Board rule that a petition for certification must be supported by a showing that the petitioner represents a substantial number of employees (commonly called a "showing of interest") in order that Board processes not be abused.[13] The rule has since been incorporated in the Board's *Statement of Procedure,* Series 7, Section 101.18 (a) and (b), 23 F. R. 3254. Those portions of the Senate Report relied on merely confirm that a petition filed by an individual employee under the new subsection (A) of 9 (c) (1) must also be supported by a substantial showing of interest.[14]

Finally, the Board's argument that the statute does not mean what it explicitly states because there is no legislative history in support thereof would appear to reverse a rule of construction long adhered to by the court. We submit that "the plain words and meaning of a statute cannot be overcome by legislative history which through strained processes of deduction from evidence of wholly ambiguous significance may form the dubious basis for inference in every direction. *Ex Parte Collett,* (1949), 337 U.S. 55, 61, *Gemsco, Inc.* v. *Walling,* (1945) 324 U.S. 244, 260.

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[13] For the "rules of decisions" referred to, see the following:
Atlas Powder Co., 43 NLRB 757 (1942).
Pacific Manifolding Book Co., Inc., 3 NLRB 551 (1937).
M. Lowenstein & Sons, 6 NLRB 216 (1938).
Consolidated Aircraft Corp., 7 NLRB 1061 (1938).
Swift & Co., 21 NLRB 1169 (1940).
San-Equip, Inc., 44 NLRB 524 (1942).

[14] The observations at page 10 of Senate Report 105 do not make "substantiality" applicable to the newly created right of employers to file under subsection (B), the comparable restriction on employers being that a prior demand for recognition must have been made.

At page 25 of the *Report* is the following explanation:

> "Neither of these amendments affects the present Board's *rules of decisions with respect to dismissal of petitions by reason of an inadequate showing of representation* or the existence of an outstanding collective agreement as a bar to an election. In other words, the Board could still dismiss an employee or employer's petition, if a valid contract were still in effect." (emphasis supplied)

CONCLUSION

For the reasons set forth in the Brief and Reply Brief of Petitioner, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

BROWN & GETTLER
J. W. Brown
Ben Gettler
Jonas B. Katz
1505 Fountain Square Bldg.
Cincinnati, Ohio
Attorneys for Petitioners